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Previous References 1936-37 (63)

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Later References

GENERAL AND REVENUE SECRETARIAT.

Serial No. 5

Part B for April 1937

SUBJECT.

Copy of the Joint Report of the Constitutional & the Federal Finance Committees on the opinion of Mr. J. H. Morgan, K.C..

CB 1788

Kemmangandi,

4th April 1937.

4230

No. 2523

Enc. one

CB 53-86-5

Dear Mr. Kesava Iyengar,

I am directed to send herewith for favour of disposal a copy of the Joint Report of the Constitutional and the Federal Finance Committees on the opinion of Mr. J.H. Morgan, K.C. received from His Highness the Maharaja Dhiraj Mahendra Bahadur of Patiala.

Yours sincerely,

for perusal.

Dewan

1st member

2nd member

8-4-37

9/4

9/4/37 8/4

With the compliments
of His Highness the Maharaja
Dhiraj Mahendra Bahadur of Patiala.

Motibagh Palace,
Patiala,
24th March, 1937.

JOINT REPORT
of the
Constitutional and the Federal Finance Committees
on the
Opinion of Mr. J. H. Morgan, K. C.

PRINTED AT
THE BHUPINDER STATE PRESS,
PATIALA.

LIST OF THE PRINCES

AND

MINISTERS WHO ATTENDED THE JOINT MEETING OF THE CONSTITUTIONAL AND THE FEDERAL FINANCE COMMITTEES, HELD AT THE PATIALA HOUSE NEW DELHI, ON THE 22ND FEBRUARY, 1937.

Princes.

1. His Highness the Maharaja Dhiraj of Patiala.....Chairman.
2. His Highness the Yuvraj of Limbdi.

Ministers.

Baria.

3. Rao Bahadur Moti Lal L. Parekh.

Bikaner.

4. Sir Manubhai Mehta.

Bhavnagar.

5. Sir Prabha Shanker Pattani.

Cochin.

6. Sir Shanmukham Chetty.

Dewas Junior.

7. Mr. V. M. Pawar.

Hyderabad Deccan.

8. Mirza Ali Yar Khan.

Jaipur.

9. Rai Bahadur Amar Nath Atal.

Jamnagar.

10. Professor L. F. Rushbrook Williams.

Jind.

11. Mr. G. Kaula.

Janjira.

12. Rao Bahadur H. B. Kotak.

Jodhpur.

13. Rai Bahadur Kunwar Sen.

Mandi.

14. Sardar D. K. Sen.

Mysore.

15. Mr. N. Madhava Rao.

Partabgarh.

16. Mr. C. M. Shroff.

Patiala.

17. Sardar K. M. Panikkar.

Rampur.

18. Mr. B. H. Zaidi.

Rajpipla.

19. Khan Sahib P. D. Kothawala.

Rewa.

20. Dewan Bahadur B. N. Zutshi.

Sachin.

21. Mir Maqbool Mahmood.

Sangli

22. Rao Bahadur Y. A. Thombare.

Secretary.

Sardar Hari Sharma of Patiala.

REPORT ON THE OPINION OF MR. J. H. MORGAN, K. C.

1. The Constitutional Committee have already submitted the first part of their Report on the Instrument of Accession and certain other matters relating to the problems of accession. They have at this late stage, however, been given the opinion written by Mr. J. H. Morgan, K.C., and have been requested to examine and report on it. Before doing so, they desire to make the following preliminary observations :—

2. The Committee do not feel inclined to deal with the remarks contained in the first Section of the opinion which they regard as irrelevant to the discussion of the present subject. They, however, wish to place on record their appreciation of the valuable assistance rendered by Judge Wadhams throughout the discussions on this committee. They feel bound to take notice of the statement in the opinion that one particular Counsel was "imported for the occasion". The Committee's Report was not based upon the sole advice of any one lawyer. Apart from the fact that most of the members of the Committee have themselves taken part in the Federal discussions continuously from their very inception, they have had before them for examination when framing their own Report, the Memoranda of different Committees, States and groups of States, severally or jointly advised by such eminent Counsel as Sir Wilfrid Greene, Sir Walter Monckton, Sir William Jowitt, Mr. Gavin Symmonds and Sir Tej Bahadur Sapru. The Committee feel that they cannot brush aside the results of their own discussions and examination and the highly valued opinions already received from such eminent Counsel, in addition to the advice of Judge Wadhams and Mr. Morgan.

3. The Committee while recognising the meticulous care and attention which Mr. Morgan has devoted to many details, consider that the majority of these have been carefully considered and evaluated by other eminent Counsel in the course of the last 4 years. They have either been embodied in advice already given or disposed of by the States' political and legal advisers long anterior to the present stage. No new issue has arisen requiring wholesale reconsideration.

4. Further, the opinion deals with the Act, the Instrument of Accession and the Instrument of Instructions on the assumption that, without the concurrence of the States, the Act may, in disregard of Section 6 (5), be radically amended, that the Instrument of Accession may be overriden by the Federal Executive and that His Majesty's Instrument of Instructions to the Governor-General may be rendered nugatory by a secret despatch of the Secretary of State. It would be impossible on that basis to negotiate a Treaty or an Agreement even between independent parties. Besides, it is not practicable to isolate either the Act, the Instrument of Accession or the Instrument of Instructions, from the political background in which they would operate or to regard them as independent of each other. They form an integral structure in which each has a distinct function and value of its own and in examining the three documents the Committee have throughout had in mind the relation which each thus bears to the other and the role each is designed to play.

5. In examining the opinion, the Committee's task has been rendered more difficult by the fact that the opinion is devoted more to a criticism of the different literature which was placed before the Committee than to the problems to which the Committee were invited to address themselves. On account of this method of approach, many of the fundamental problems arising from accession have been left untouched and the different parts of the opinion are not organically correlated. For example, the main part of Section II is devoted to an elaborate criticism of a few items in an Explanatory Memorandum which was merely placed before the Constitutional Committee to serve as a preliminary basis of discussion. On a careful examination of the Chamber's essential and negotiable safeguards mentioned in that Memorandum, the Committee came to the conclusion, recorded in paragraph 3 * of their Report, that the safeguards had been in substance provided and that in so far as they have not been met or remained open to doubt, the recommendations of the Committee would effectively achieve the objects which the safeguards were designed to serve. To this opinion, after the fullest consideration of Mr. Morgan's advice, they still adhere. They have been further fortified in coming to this conclusion by the opinion of the Chamber's Counsel, of whom Mr. Morgan himself was one, the others being Sir Wilfrid Greene and the Rt. Hon'ble Sir Willlam Jowitt, that "the Bill appears to us to have been drafted with scruplous regard for the rights of the Rulers of the States". Since Counsel expressed this opinion, the Bill was further modified and strengthened in the interests of the States by amendments in various stages of its passage through both Houses of Parliament. As far as the first of the essential safeguards is concerned, Mr. Morgan appears to be labouring under the misunderstanding that the States are unaware of the fact that to the extent to which they will accede they will be contributing to the Federation, constituted by themselves in conjunction with the Crown, the exercise of certain of their sovereign powers, authority and rights, a contribution implicit in the conception of Federation. The first essential safeguard originally formulated by the Chamber related to that portion of the States' sovereignty the exercise of which is not made over to the Federation and the Committee maintain that this has been adequately safeguarded by the Instrument of Accession proposed by the Committee.

6. In illustrating his point that the sovereignty of the States has been impaired, Mr. Morgan has referred to Clause 6 of the Bill and shows an apparent misunderstanding of the reasons which led the States to demand an amendment of the Clause. The apprehensions of the States were not

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* "The Committee had before them both the essential and the negotiable safeguards suggested by the Chamber of Princes in 1933 and have examined them with a view to ascertaining how far they had been met by the Government of India Act 1935, and by the proposed draft Instrument of Accession. A list of the safeguards is contained in Annexure III. Upon careful consideration they have come to the conclusion that the safeguards have been substantially met and that, in so far as they have not been met or remain open to doubt, the recommendations suggested below will effectively achieve the objects which the safeguards were designed to serve. Nor are the recommendations conceived only in the light of the safeguards thus formulated; they represent conclusions arrived at independently by an examination of the Act and of the Draft Instrument and by an appreciation of what they consider to be essental in the interests of the States."

based, as would appear to be suggested by Mr. Morgan by the italics used by him in the quotation from the Princes' letter to His Excellency the Viceroy, of the 27th February, 1935, on the fact of Clause 6 (1) (a) making the Act applicable to their *subjects*. The basic objection was to the proposal that the Rulers of Indian States should accept a piece of British Parliamentary legislation as binding upon themselves. The fact that the laws of the British Indian Legislature and of Parliament will apply to subjects of Federated States must be considered in the light of section 6(1)(b) under which by acceeding, the Ruler voluntarily assumes the obligation of ensuring that due effect is given in his State to the provisions of the Act so far as they are applicable therein by virtue of the Instrument of Accession. At no stage have the States objected to the idea inherent in such a provision and their secondary objection to the mention of "subjects" in Clause 6 of the Bill was based on the consideration that the subjects would only be affected by virtue of the Ruler's accession and that therefore only the Ruler, as sovereign and high contracting party, required mention. In regard to the States' basic objection to Clause 6, mentioned above, the Committee disagree with the view that the amendments to that clause were purely illusory, and can do no better than to quote the opinion of two eminent English Counsel, Sir Wilfrid Greene and Sir Walter Monckton, which are given in Annexure "A." The Committee regard the two opinions as being decisive.

8. Mr. Morgan has proceeded to a consideration of Section 8 (2) dealing with the concurrent powers of the States in the Federal field. His remarks appear to be based upon a typographical error in one of the Memoranda supplied to the Committee and subsequently corrected, as relating to Section 6 (2), in the presence of Mr. Morgan. The remarks do not, therefore, call for any comment. On the other hand, the Committee feel bound to comment on the view expressed by Mr. Morgan in regard to the question of coercive powers referred to in paragraph 7 of his opinion. Perhaps the most effective reply to the apprehensions expressed in that paragraph is contained in Mr. Morgan's own opinion, prepared in conjunction with Sir Wilfrid Greene and Sir William Jowitt in 1935. The opinion runs :—

"In the case of the State "Executives," viewed as agents of the executive authority of the Federation, there is a marked distinction between them and the Provinces which is both express and implied in the Bill. As we have already pointed out, if "a Province" has not given effect to the "directions" of the Governor-General referred to in the preceding paragraph, the Governor-General may issue the directions, thus disregarded, as "orders" to the Governor. The Governor will be bound to execute such orders. He will be a servant of the Crown, holding office during pleasure, and if he disregards such orders he may be removed. Furthermore if any Crown servant, e. g., a member of the Indian Civil Service, fails to execute the "orders" transmitted to the Governor by the Governor-General such Crown servant may be removed in that case by the Governor himself whether his Ministers concur or not. In all these respects the position of the States is entirely different. In other words

there is no such subordination of the State Governments and State servants to the Governor-General. The Ruler of a State is not, like the Governor of a Province, a servant of the Crown. Therefore no such provision is made in the Bill as there is in the case of the Governors that the Governor-General may give him "orders." The Governor-General may give the Ruler "directions" but the clause which empowers him so to do carefully omits any such provision as to the issue of "orders," if the Ruler omits to give effect to the directions, as is to be found in the case of the Provincial Governors. Furthermore the officers of a State, unlike the officers of a Province, are not, of course, and will not be, under the Constitution Act, Crown servants in any sense of the word. They can only be dismissed by the Ruler of the State. If therefore they refuse to act "in aid of the Federal Court," the Federal executive has no means of compelling them to do so. In all these respects, the "internal sovereignty" of the Federated States is "saved" by the Bill. The Bill does not contemplate the exercise of any Federal authority over the Governments of the States. It is indeed a general rule followed in all Federal Constitutions that no State Government can be compelled to act by the orders of the Federal Government, nor will a Federal Court act in aid of a Federal Government to enforce the authority of the latter over a State Government. The Supreme Court of the United States has repeatedly laid this down and the position in the Australian Commonwealth is exactly the same. The legal position in this respect was fully explained in the earlier Opinion. The principle rests upon the inexorable fact that there is no way of levying execution on a "Government." The case of the Provinces, under the Bill, is the sort of exception which proves the rule, because the Governors of the Provinces, unlike the Governors of the American and Australian States, are removeable by higher authority and therefore subject to the "orders" of the Governor-General, and the public services in the Provinces are directly, or indirectly, subject to the Governor General."

9. The Committee are in entire agreement with the above opinon which clearly confirms their own conclusions. They adhere to the view that Paramountcy is the ultimate sanction for the enforcement of Federal obligations and that the Federation has no power to penalise a contumacious State, beyond resorting to the Governor-General's power, in his discretion, to issue directions to the Rulers. Failure to carry out those directions clearly would set into motion the play of Paramountcy powers and Sections 128 and 2 appear to be decisive on the point. In regard to Section 124 (3) which Mr. Morgan regards as a manifest violation of Federal principles in so far as it empowers the Federal Legislature to impose duties or confer functions on States, it may be noted that at no previous stage of the discussions was there any objection taken to this by the States as a result of Counsel's strong support of that clause in the above quotation. Besides, the States had also in mind the alternative, namely, the planting of Federal officers in States to execute Federal duties or functions - an alternative which the States have throughout been anxious to avoid. In general, attention is invited to the conclusion

arrived at by Counsel in the above quotation that the internal sovereignty of the States in all the provisions dealing with Administration has been "saved".*

10. In regard to paragraph 8 the Committee need only mention that the point raised by Hyderabad Counsel in regard to the word "uniting" occurring in the clause of purpose was only secondary and the criticism was chiefly directed against the importation of a political clause in a legal document. Hyderebad's contention was, therefore, that the entire clause should be omitted. As a point of secondary importance, it was explained that while Section 5 of the Act itself contained the word "united", it was a different matter altogether to put that word in the mouth of the Ruler himself by inserting it in his Instrument of Accession. The Constitutional Committee took the larger and more serious aspect into consideration and approved the suggestion regarding the entire omission of that clause.

11. The Committee have had no misconception in their minds in regard to the implications of Section 45 nor have they ever thought that the right as such of secession existed in that Section. They are glad to note that Mr. Morgan agrees with the view expressed in the course of the Constitutional Committee's discussions that it is unnecessary to go into the matter at this stage.

12. Regarding paragraphs 9, 10, 11, 12, and 13 of the opinion, the Committee are satisfied that Schedule II of the Act read in conjunction with Section 6 (1) (a) and 6 (5) adequately safeguards the fundamental structure to which the States will accede. Amendment of the provisions saved from amendment under Schedule II will affect the accession of the States in altering the basis of the given Constitution to which they have acceded. Mr. Morgan does not appear to have taken into consideration the importance of Section 6(1) (a) in this regard and in particular of the words "accedes to the Federation as established under this Act". Reference may be made in this connection in addition to the opinion of Sir Wilfrid Greene in Annexure "A" to the views expressed by Sir Thomas Inskip, K.C., and Sir Donald Sommervelle, K.C., quoted in Annexure "B" The argument that if later on Parliament chose to amend Section 6(5) itself the States would have no remedy is purely academic inasmuch as in the similarly inconceivable event of Parliament deciding to annex their territories, the States would equally have no remedy. The Committee fear that to take account of such contingencies is a procedure as remote from reality as speculation on the effect likely to be produced if the law of gravitation were suddenly to cease to operate. As regards the authority cited by Mr. Morgan to support his contention in paragraph 12 of his opinion, reference may be made to Annexure "C".

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* According to Mr. Morgan, Section 124 "is without precedent in any Federal Constitution and may properly be described as anti-Federal." It has been held in Australia that the Constitution being dominantly federal, of two possible constructions that which is more in conformity with the essential features of the federal system will be accepted. (*Union Label Case*, 6 C. L. R. page 503). On the basis of this decision it might rightly be argued that the interpretation placed on this Section by Mr. Morgan should not be accepted.

13. The Committee now proceed to discuss Section III of the opinion. They have examined with interest the cases cited. While the cases are dealt with separately by certain members of the Committee in Annexure "C", the Committee, on the basis of Mr. Morgan's own warning regarding the dangers of analogies, desire to emphasise that the proposed Federal Constitution for India has no precedent or parallel either in Dominion Constitutions or in other Federations outside the Empire. There is elsewhere, for example, no such element as the paramountcy functions of the Crown or, for that matter, the Instruments of Accession over-riding the Act. In the Constitutions within the Empire to which Mr. Morgan has confined his references, there are no such sovereignties as Indian States uniting with the Crown for the purpose of forming a Federation. While accepting in general the possibility of interpretations being given by the Privy Council on the basis of precedents wherever applicable, the Committee cannot believe that the Privy Council would be incapable of distinguishing between two such essentially different types of political structure as are represented on the one hand by the proposed Federation of India and, on the other, by any one of the Constitutions of the Empire.

14. Sections IV and V of the opinion deal with two different matters, namely, the suggestion made in Sir Akbar Hydari's letter to Sir Bertrand Glancy in regard to devising some method to place on record the agreed understandings between the parties so as to throw light on the construction of the Instrument and the suggestion made by the Informal Committee of Ministers for the inclusion in the Instrument of a clause providing for an additional Schedule protecting the extra-statal privileges and rights enjoyed by the States. The Informal Committee of Ministers appear to have realised, as do the present Committee, the difficulty in the way of achieving both these results by means of the Instrument itself and Sir Akbar Hydari's letter leaves both the matters to be explored and dealt with appropriately by the Government of India so as to satisfy the States. In regard to the first suggestion, the Informal Committee appear to have had in mind the incorporation, in the Rules of Practice and Procedure of the Federal Court, of provisions which would make it possible for the suggestion to be implemented, and the suggestion was considered practicable by the present Committee in view of the essentially contractual nature of the Instrument, as distinguished from the Statute itself. The Committee are pleased to see that Mr. Morgan regards the suggestion as a valuable one; they feel, however, that the arguments against a request of the nature made for exploration to the Government of India did not require such elaborate enumeration by Counsel on behalf of the States. In regard to the Schedule of rights, the difficulty in the way of its inclusion in the Instrument itself has all along been realised. Sir Akbar Hydari's letter to Sir Bertrand Glancy only requested that some method should be devised whereby, in addition to the political protection afforded in the Governor-General's discretion under Section 12 (1) (g), legal protection should be afforded by appropriate means. The present Committee similarly came to the conclusion that such legal protection was necessary and, realising the difficulty of affording such protection by means of the Instrument, suggested the possibility

of Agreements with the Federation such as are contemplated in Section 204 (1) (a) (iii) with the approval of His Majesty's Representative. The Committee observe that Mr. Morgan has not suggested any constructive proposal for dealing with this important matter and consider that the difficulties in the way of its realisation are by no means insurmountable.

15. With regard to paragraph 30, the Committee are glad to note that Mr. Morgan agrees with the views held by them.

16. The Committee have nothing to add in regard to Section VI of the opinion, to the remarks already made in the preliminary observations dealing with the Instrument of Instructions. The question of the observance of the Instrument of Instructions and the possibility of some future Secretary of State going against it by secret instructions may, if bad faith be assumed, not be outside the scope of hypothetical possibility but the rights to be protected under the Instrument of Instructions are in general not such as are capable of legal enforcement; and wherever, in the view of the Committee, the States required legal protection, as in the case of extra-statal rights in the Federal sphere, the Committee have recommended that such protection should be insisted upon.

17. The Committee are pleased to find that the views expressed in Section VII sub-section A of Mr. Morgan's opinion are on the whole the same as their own.

18. With much of Mr. Morgan's views on the Federal Legislative List, the Committee are in agreement. It is their own considered opinion that the general limitations should be as few as are necessary to define the boundaries of Federal Authority in regard to each item. But they cannot agree with what Mr. Morgan's apparent deduction seems to imply that general limitations will make Federation unworkable. Such limitations do not go contrary to the Act itself, and are rendered necessary by the arrangement of items in the Federal Legislative List, which over-lap each other. Further, they are necessitated by the ancillary powers of legislation arising out of items which, unless restricted, may by implication confer extensive powers, such as acquisition of land, on the Federation. Mr. Morgan's own fears regarding the wide extent of Federal authority justify such limitations. The example quoted of the general limitation regarding acquisition of land in States seems to the Committee to be particularly unhappy, as it would appear that the authorities themselves have never claimed for the Federation any right like the one which Mr. Morgan declares "essential to the effective exercise of the Federation's legislative powers." On the other hand, so far as the Committee are aware, the risk against which the States desired in this regard to provide was appreciated by the Viceroy's own Representatives, while the case of the *Attorney General for Quebec vs. Nipissing Railway Company* (1926) A. C. P. 724 only strengthens the apprehensions felt by the States and justifies the general limitations proposed.

19. Mr. Morgan's views in respect of the executive authority of the Federation are in general agreement with what has been stated by

the Committee in their first report except that the arguments adduced and the conclusions arrived at in Para 53 of the opinion regarding the coercive authority of the Federal Legislature are not consistent with what he himself has stated in the quotation cited earlier in Paragraph 8 as a matter of irrefutable law (vide also Annexure "C").

20. Paragraph 54 of the opinion urges that the very idea of reservations is "anti Federal". The Committee desire to point out that the new Constitution rests on the basis that the States are entitled to "reserve" their legitimate interests in every respect. The question to be considered is not whether any particular proposal is "anti Federal" but whether it is against the scheme of the Act. As Mr. Morgan has himself stated, the Constitution "conforms to no theory of federalism, if such there be, but it is none the worse for that".

21. The Committee are in agreement with Section IX of Mr. Morgan's opinion, which deals with "the Judicial power in the Federation".

22. With Mr. Morgan's statement in Section X regarding the nature of the difficulties of securing adequate protection against acts of discrimination, the Committee are generally in agreement; they consider, however, that certain aspects of discrimination can be adequately provided against by the special powers given to the Governor-General in this behalf under Sections 12 (1) (g) and 108 (f) of the Act as well as by Article XV of the Instrument of Instructions, which the Committee have in their Report asked to be strengthened. Such aspects may not be legally enforcible but in so far as the other and more serious aspects are concerned, for example, discrimination in taxation, the Committee have suggested a general limitation for the consideration of the States.

23. The Committee are in entire agreement with Mr. Morgan's opinion on the nature of Paramountcy contained in Section XI which is a statemeut of the position authoritatively accepted since the Report of the Butler Committee.

24. Section 45 of the Act, as dealt with in Section XII of the opinion, has already been treated in an earlier part of the present Note.

ANNEXURE A.

1. Sir Wilfrid Greene's Opinion.

"The first and fundamental objection to the original clause was that it seemed to countenance the suggestion that the provisions of the Act after acceptance would apply to the States and their subjects *proprio vigore* as a piece of Imperial Legislation. It was felt that it was essential that it should be made clear beyond all doubt that the really operative document was the Instrument of Accession and that the Constitution Act should only apply to the States by virtue of and subject to the terms of the Instrument of Accession.

* * * * * *

"In the first place in subsection (1) the word "*accepts this Act as applicable to his State and his subjects*" are deleted and in substitution therefor there are inserted the words "*accedes to the Federation as established under this Act*". This form of words places the Instrument of Accession in its proper constitutional position and negatives the suggestion that the Act applies to the States *proprio vigore* as a piece of Imperial Legislation.*

"Next, in paragraph (a) it is made plain that the exercise of Federal authority in a Federated State arises "*by virtue of the Instrument of Accession but subject always to the terms thereof*" and is exercisable "*for the purposes only of the Federation.*"

2. Sir Walter Monckton's Opinion.

"The words "acceptance of the Act" have gone and it has been made abundantly clear that the Act does not apply *proprio vigore* to the States. This follows from the words "by virtue of his Instrument of Accession but subject always to the terms thereof" in clause 6 (1) (a) and the concluding words of clause 6 (4). These words establish beyond doubt that in the words of paragraph 2 of the Princes' Note the Instruments of Accession and not the Constitution Act are the really operative documents binding the States to the Federal Constitution. The Instrument of Accession is thus put beyond doubt in its proper constitutional position as the document by which alone and subject to the terms of which the States become snbject to the constitution and to the Federal powers exercisable in the States."

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* There is nothing in the Bill which gives to the Imperial Parliament any power to legislate for a State although its power to legislate for British India is preserved by Clause 110 (a). The effect of this clause is certainly not (as we understand has been feared) to give Parliament power to legislate for a State. If Parliament legislated for British India upon a Federal subject (a) such legislation would not be operative in the States (b) any existing Federal law upon that subject would remain operative in the States.

ANNEXURE B,

1. **Opinion of Sir Thomas Inskip, K. C.**

".....Any amendment of a provision (not comprised in Schedule 2) will give a State the right to reconsider its position, because the Instrument of Accession was made upon a certain basis and an amendment..... has changed that basis." (Hansard, Vol. 302, p. 164).

2. **Opinion of Sir Donald Sommervelle K. C.**

".....This Amendment (i. e., the new sub-section) would safeguard the rights of the States in exactly the same way as they are safeguarded in Schedule 2, namely, if in the Amendment which Parliament makes it alters the protective Clauses which affect the States, then their Instruments of Accession are voided. They need not go out automatically, but they have a right to say "This is a different Federation." Negotiations will take place, but in the last resort they have the right to say "in spite of your negotiations, this is not the Federation which we joined and therefore our Accession is no longer a valid Instrument." (Hansard, Vol. 302, p. 794).

ANNEXURE C.

Note on English, Australian and Canadian Decisions.

Authority of the Imperial Parliament with respect to Federated States.

It has been argued that Clause 6 of the Draft Instrument of Accession does not operate to prevent Parliament from legislating in respect of Federated States and, in particular, form legislating in violation of the Instrument of Accession. It has been further argued that "there is no rule of law, whether of international law or of constitutional law, to prevent Parliament from legislating for or exercising jurisdiction over the Indian States or their Rulers". In support of this argument, the following *obiter dictum* has been cited from the judgment of Brett, L. J. in *Niboyet* v *Niboyet* (1878) 4, P. D. 1. "If the legislature of England in express terms applies its legislation to matters beyond its territorial capacity, an English court must obey the English legislature, however contrary to international comity such legislation may be". It is, however, clear that this decision has no bearing on the point in issue. In the case referred to above, a marriage was solemnised at Gibralter between a Frenchman and an English woman. The husband resided for several years in England, but being a Consul for France he retained his domicil of origin. The woman presented a petition for divorce, alleging acts committed in England, and desertion. The husband appeared under protest and prayed to be dismissed. It was held that the English Court has jurisdiction to grant a divorce against a foreigner in England. It was no where claimed that Parliament had authority to legislate for any territories outside His Majesty's Dominions; indeed, the question was neither raised nor argued before the Court. All that the Court decided was that Parliament could legislate conferring jurisdiction on British Courts in respect of foreigners within the British Dominions. It is no doubt true that there is no legal limitation on the authority of Parliament to pass any legislation which applies outside the territories of the British Dominions, but such legislation can have no operative effect outside those territories. Parliament could certainly claim to legislate for Indian States, whether Federated or Non-Federated, as much as it could claim to legislate for France or Germany. On the other hand, it has been authoritatively laid down by the judicial Committee of the Privy Council in *Hemchand vs. Sakar Lal* (Bomb. L. R. N. 129) that Parliament had no authority to legislate for Indian States. This position, therefore, remains entirely unaffected by the acceptance of the Federal Constitution.

It should also be pointed out that the extract cited by Mr. Morgan from the dissenting judgment of Brett, L. J. is misquoted, the word 'territorial' having been substituted for the word 'legislatorial'. In the original the sentence reads as follows. "If the legislature of England in express terms applies its legislation to matters beyond its *legislatorial* capacity an English Court must obey the English legislature, however contrary to international comity such legislation may be" (at page 20).

Implied powers of the Federal Government.

Fort Frances Pulp and Power Co., Ltd. vs. Manitoba Free Press Co., Ltd. (1923 A. C. p. 695).

It has been argued on the basis of this decision that the Indian Federation will enjoy and exercise a considerable portion of implied powers infringing on the continuance of sovereignty and powers of the States. A careful examination of the judgment of the Privy Council in this case, however, reveals the very important fact that the doctrine of implied powers enunciated in the judgment was founded on certain specific sections of the British North America Act, namely, Sections 91 and 92. The head-note of the case which is fully supported by the judgment of the Privy Council delivered by Lord Haldane runs thus: "Under Section 91 and 92 of the British North America Act. 1867, the Dominion Parliament has an implied power, for the safety of the Dominion as a whole, to deal with a sufficiently great emergency, such as those arising from War, although in so doing it trenches upon property and civil rights in the Provinces, from which subjects it is excluded in normal circumstances". It is clear from the judgment that it was not considered to be an essential implication of a Federal Constitution that such implied powers should be enjoyed and exercised by the Central Government, on the contrary, reference has been specifically made by Lord Haldane to the provision in Section 91 that the Dominion Parliament has, under the British North America Act, the residuary power regarding the peace, order and good government of Canada as a whole. There is a substantial point of difference between the Canadian Constitution and the Indian Federation. In the Indian Federation the residuary powers of legislation will continue with the States, whereas under the Canadian Constitution, the residuary powers remain with the Dominion. This case, therefore, does not afford the slightest justification for the view that under the Indian Constitution the ambit of Federal powers will necessarily be enlarged to such an extent as to be "highly detrimental to State rights."

In re The Regulation and control of Aeronautics in Canada.

The head-note reads as follows:—

"The whole field of legislation in relation to aerial navigation in Canada belongs to the Dominion.

Having regard to (a) s. 132 of the British North America Act, 1867, which gives to the Parliament and Government of Canada, all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, under treaties between the British Empire and foreign countries, (b) the fact that an international Convention of 1919, a treaty under s. 132, covered almost every conceivable matter relating to aerial navigation, and (c) the further powers of the Parliament of Canada under s. 91, heads 2 (trade and commerce), 5 (postal services) and 7 (military and naval services), substantially the whole field of legislation in regard to the subject belongs to the Dominion. Any small portion not vested in

the Dominion by specific words in the Act of 1867 is not so vested in the Provinces, and necessarily belongs to the Parliament of Canada under its authority to make laws for the peace, order and good government of Canada. Further, the subject of aerial navigation, and the fulfilment of Canadian obligations under s. 132, are matters of national interest and importance; aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

Consequently, the Dominion powers under s. 132 in relation to the obligations under the Convention were exclusive powers, and the Parliament of Canada had authority to enact the Aeronautics Act (R. S. Can., 1927, c. 3) s. 4 and the Air Regulations, 1920, respecting the licensing of pilots, navigators, etc., and the regulation and licensing of all aircraft, aerodromes and air stations."

The judgment of the Privy Council in this case does not support the view that the Indian Federation will necessarily enjoy and exercise implied powers of legislation. The following extracts from the judgment of Lord Sankey make the position quite clear :—

"To sum up, having regard (a) to the terms of s. 132; (b) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (c) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion." Here again, it is to be noticed that Lord Sankey definitely states that the implied powers of the Dominion Legislature are derived from the fact that the Canadian Constitution Act specifically provides for legislation by the Dominion for the peace, order and good government of Canada. There is no such provision in the Government of India Act.

In *Russell v. The Queen* (7 A. C. 829) it was held that "the Canadian Temperance Act, 1878, which in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences punishable by fine and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament." The basis of this decision was that the objects and scope of the Act,

viz., to promote temperance by means of uniform law throughout the Dominion relate to the peace, order and good government of Canada and not to the class of subjects "property and civil rights" which lies within the competence of the Provincial Legislatures. Here again, it is clear that no general principle was laid down that the Central Government in a Federal Constitution must necessarily have ancillary or implied powers; on the contrary, the judgment was founded on the specific provision of the British North America Act that the Dominion Legislature has power to make laws for the peace, order and good government of Canada.

In assessing the implications of the Government of India Act the leading cases relating to the Australian Constitution must also be read with a great deal of caution, particularly in regard to the question of the implied powers of the Federal Government, since there is an express provision in the Commonwealth Constitution conferring ancillary powers on the Federal Legislature. Placitum XXXIX of Section 51 of the Australian Commonwealth Act reads as follows: "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth or in the Federal judicature, or in any Department or officer of the Commonwealth." There is no such express grant of incidental powers in the Government of India Act. It is, therefore, submitted that in the absence of any such express provision it would not be proper to assume that the extent of the implied powers derived from specific provisions of the Canadian and Australian Constitutions will be the same in the Indian Federation. It is no doubt true that the grant of power to legislate concerning a definite subject matter carries with it a grant of all proper means not expressly prohibited to effectuate that power, but as Isaacs, J, has pointed out *(the Australian Boot Trade Employees Federation vs. Whybrow and Co. (1910) 11 C. L. R. at page 338)*, it is not open to the grantee of power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectually coping with the evils intended to be met. This limitation on the principle of ancillary powers will apply with greater force to the Indian Federation since under the Government of India Act there is no such express grant of powers, nor is there any general power conferred on the Federal Legislature to legislate for the peace, order and good Government of India.

The State of New South Wales.
V.
Commonwealth and others (1931-1932) 46 C. L. R. 155.

Commonwealth of Australia.
V.
The State of New South Wales (1923) 32 C. L. R., 310.

Reference has been made to these cases in para 15 of Mr. Morgan's opinion. It has been argued that "the result of the application of this doctrine by the High Court of Australia is forcibly illustrated by a recent judgment in which it was held that, in order to enforce a certain Section

(105A) of the Federal Constitution, a Federal law empowering the confiscation of the revenues of a State in default of the payment of interest on guaranteed loans, was a valid exercise of Federal power. The decision in the case of *The State of New South Wales v. Commonwealth and Others* (1931-1932) 46 C. L. R. 155 has been described by the present Attorney-General of the Commonwealth, Mr. Menzies, as "the death-knell of State rights."

If this reference is intended to mean that similar tendencies will operate under the Indian constitution so as to deprive the States of their sovereignty, the view is not supported ty the judgment of the Australian High Court in these cases. The decision rests on the provisions of Section 105 A of the Commenwealth Constitution Act. Section 105 A enables the Commonwealth to make agreements with the States with respect to the public debts of the States including certain enumerated matters. Sub-Section (3) enables the Commonwealth Parliament to legislate "for the carrying out by the parties thereto of any such agreement." Sub-Section (5) provides that every such agreement and any variation thereof shall be binding upon the Commonwealth and States, notwithstanding anything in the Commonwealth or States Constitutions or any law of the Parliament of the Commonwealth or State. The Government of New South Wales failed to discharge its obligations under the agreement with the Commonwealth in respect of certain interest payments upon its public debts. In consequence of this default, the Commonwealth Parliament passed the Financial Agreements Enforcement Act 1932 which provided for the payment of the amount due by the defaulting State by a direct seizure of the State revenue in a manner analogous to garnishee proceedings. Action was brought by the State of New South Wales for a declaration that this enactment was invalid. Rich and Dixon JJ. in a joint judgment held that the Financial Agreements Enforcement Act which provided for the seizure of State revenue was fully authorised by Section 105 A (3), Section 75 (3) and Section 51 of the Commonwealth Constitution Act. It is clear from this judgment that no such legislation would have been held valid in the absence of Section 105 A of the Australian Constitution Act. It is, therefore, entirely unreasonable to argue on the basis of this decision that similar sort of legislation might be enacted by the Federal Legislature of India, since there is no provision in the Government of India Act corresponding to Section 105 A of the Commonwealth Act.